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Supreme Court of the United States

OCTOBER TERM 1949

No. .....

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
HAMPORTZOON CHOOLOKIAN,
Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,
Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
HAMPORTZOON CHOOLOKIAN,
Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Your petitioner, HAMPORTZOON CHOOLOKIAN, respectfully prays that a writ of certiorari issue to review a decision of the Court of Appeals of the State of New York, made on October 20, 1949, which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, made on the

31st day of January, 1949, which affirmed two orders of the said Supreme Court, in and for the County of New York, entered on the 2nd day of January, 1948.

In support of his petition, your petitioner respectfully shows to this Honorable Court:

A

STATEMENT OF THE MATTER INVOLVED

I. The parties and the nature of the decision sought to be reviewed.

Your petitioner is the father of Albert, George and Alice Choolokian, who are minors. The Mission of the Immaculate Virgin and The New York Foundling Hospital are Roman Catholic child-care institutions in the City of New York. At the time of the issuance of the writs hereinafter mentioned, the Mission of the Immaculate Virgin had the physical custody of Albert and George Choolokian, and The New York Foundling Hospital had the physical custody of Alice Choolokian. The legal custody of all of the said three children was, under the laws of the State of New York, in the Commissioner of Welfare of the City of New York. On October 31, 1947, your petitioner, being desirous of obtaining the custody of his said children, obtained two writs of habeas corpus out of the Supreme Court of the State of New York,—one directed against the Mission of the Immaculate Virgin directing it to produce the bodies of the said Albert and George Choolokian, and the other directed against The New York Foundling Hospital directing it to produce the body of the said Alice Choolokian. The decision sought to be reviewed affirmed the dismissal of the said writs, and the remand of the said Albert and George Choolokian to the custody of the Mission of the Immaculate Virgin, and the said Alice Choolokian to the custody of The New York Foundling Hospital. By reason of the circumstance that the legal custody of the said children was, under the laws

of the State of New York, in the Commissioner of Welfare of the City of New York, the said Commissioner was made a party respondent to the proceedings under the said writs in the course of the same.

II. The nature of the litigation which resulted in the decision sought to be reviewed.

(a) The circumstances under which the respondent-institutions obtained custody of petitioner's minor children.

The circumstances under which your petitioner's said minor children came into the custody of the aforementioned two institutions, are as follows:

Your petitioner is an Armenian by birth, having been born in the year 1899, in the Town of Kanus, in the then province of Armenia, of the Turkish Empire, now the Republic of Armenia, one of the constituent Republics of the Union of Soviet Socialist Republics. In 1913 your petitioner came to the United States, and in 1929 he became a naturalized citizen thereof. Your petitioner is married to Ashken Choolokian; and the above named three children, together with three other children to be referred to hereinafter, are the children of the said marriage. All of the said children were born in the United States,—the youngest, Alice by name, on December 14, 1941. Within two months after the birth of the said child, your petitioner's wife became mentally ill and was committed to Kings Park Hospital, a State institution, located at Kings Park, Long Island, in the State of New York, where she remained until released therefrom on November 1, 1947, in order to accompany your petitioner to Soviet Armenia (fols. 225, 231, 240, 445, 574, 587, 1157, 1174-1175).

Your petitioner is a shoemaker by trade; and at the time of the birth of his said last child and the illness of his wife he did not have steady employment. He was unable to take care of his six children, the oldest of whom was then 11 years of age; and he therefore applied to

the Department of Welfare of the City of New York for assistance. At the suggestion of the said Department he voluntarily turned over the custody of his children to the said Department; and the Department thereupon, under the laws of the State of New York, placed the said children with the above named two institutions,—the infant Alice with The New York Foundling Hospital, and the other five children with the Mission of the Immaculate Virgin (fol. 1175-1179).

Your petitioner is a member of the Armenian Apostolic Orthodox Church; and all of his children, except the youngest, Alice, were baptized in the said Church. In 1944, Alice, who had up to that time not been baptized, and the other 5 children, were baptized in the Roman Catholic Church at the insistence of the said two institutions, who made it a condition of the children's remaining in their care, there being no institution of your petitioner's own faith, nor any Protestant institution which could take care of them. Your petitioner has always desired to bring up his children in his own faith; and he only consented to have his children baptized in the Roman Catholic Church because forced to do so by the circumstances hereinbefore recited. He still desires to have his children brought up in his own faith (fols. 243, 632, 675-711, 723-734, 793-796, 914-915).

Subsequently, your petitioner's economic conditions having improved, he sought and obtained the custody of his oldest three children. The Department of Welfare thereupon ordered their release by the Mission of the Immaculate Virgin and Susan, Anthony and Anna Choolokian were accordingly released in August and September, 1946 (fol. 1179).

(b) The reasons for your petitioner seeking to obtain the custody of his children, and the circumstances which led to his suing out the writs of habeas corpus involved in the present litigation.

About the time when your petitioner sought and obtained the custody of his three older children, a movement

began among Armenians residing in the United States for their repatriation to the Republic of Armenia; and negotiations began between the Government of the United States and the Union of Soviet Socialist Republics with a view to facilitating the repatriation to Soviet Armenia of such Armenians, resident in the United States, who might desire to go to Armenia, including the expatriation of Armenians who were citizens of the United States (fols. 101-103, 261-279, 315-319, 593).

These negotiations resulted in a compact or agreement evidenced by an exchange of official notes between the Department of State of the United States and the Embassy of the U. S. S. R. in the United States approving such plan; and at the same time a committee, known as the Committee for the Repatriation of Armenians, was organized among Armenian residents in the United States (fols. 261-279).

The text of the notes exchanged between the Government of the United States and the Government of the U. S. S. R., is as follows:

"The Embassy of the Union of Soviet Socialist Republics presents its compliments to the Department of State and has the honor to communicate the following:

The Government of the U. S. S. R., in accordance with numerous requests from Armenians living abroad, has authorized the Government of Soviet Armenia to organize the return of Armenians wishing to emigrate to their homeland in Soviet Armenia from a number of countries, including the United States.

In this connection the Embassy requests the Department of State to render assistance to Armenians wishing to emigrate to their homeland in granting permission for their emigration, the export of property belonging to them, the relinquishment of foreign nationality, et cetera.

Embassy of the Union of Soviet Socialist Republics
Washington April 21, 1947"

(Exh. F, fols. 1147-1149.)

"The Department of State has received the note of April 21, 1947 from the Embassy of the Union of Soviet Socialist Republics in which the assistance of the Department of State is requested in connection with the emigration of Armenians from the United States to the Soviet Union. It is presumed that some of the prospective emigrants in question are American citizens.

American citizens, or alien residents of the United States except German or Japanese nationals, who desire to emigrate to the Soviet Union are freely permitted to do so. No exit visas are required, and such emigrants are at liberty to take their personal property with them. American citizens may voluntarily relinquish their American citizenship by making a formal declaration of allegiance to a foreign country in accordance with the laws thereof.

While the Government of the United States will interpose no objections to the departure of persons of Armenian origin from the United States to the Soviet Union, it cannot fail to bring to the attention of the Embassy two categories of persons in the Soviet Union who, notwithstanding all their personal efforts and the repeated representations of the American Embassy in Moscow, have not been permitted to leave the Soviet Union for the United States. The first category consists of persons with claims to American citizenship who have been forcibly removed to the Soviet Union from various countries of Eastern Europe. All efforts of the American Embassy in Moscow to obtain permission to interview these people with a view to establishing their American citizenship and arranging for their return to the United States have been fruitless. The second category of persons consists of a relatively small number of Soviet women married to American citizens who for many months, and in several cases, years, have sought permission to leave the Soviet Union in order to join their husbands in the United States. The continued refusal of the Soviet authorities to permit the departure of these wives of American citizens is incomprehensible to the Government and the people of the United States.

In assuring the Embassy that no difficulties will be experienced by persons of Armenian origin in the United States who desire to emigrate to the Soviet

Union, the Department of State requests the favorable consideration of the Soviet Government for the facilitation of the departure to the United States of the two categories of persons mentioned.

Department of State,
Washington, May 28, 1947."

(Exhibit G, fols. 1150-1155.)

After the exchange of the said notes, the Government of the U. S. S. R. worked out a plan whereby all repatriated Armenians were to be taken care of with respect to their economic as well as their cultural needs. Your petitioner thereupon decided to give up his American citizenship and to return to Armenia, and to take his family along with him, so that his immediate family could be reunited and join his relatives who were then in Armenia. He believes that the emigration to Soviet Armenia would be to the best interests not only of himself, but of his wife and children, as they would be enabled to live together, and he would be able to bring up his children in his own faith (fols. 217-223, 248, 254, 261-279, 315-340, 380).

In pursuance of his said decision he communicated with the said Committee and the Consulate of the USSR in the City of New York; and arrangements were thereupon made for himself and his family to depart from the Port of New York on the SS. Rossia, a vessel provided for that purpose by the Government of Soviet Armenia, which was to sail from the said port on November 1, 1947, carrying with it about 160 other Armenians, residents of the United States, desiring to be repatriated to Soviet Armenia. As part of the said arrangement your petitioner did, at the request of the consulate of the U. S. S. R., execute a document renouncing his American citizenship and pledging allegiance to the Government of the U. S. S. R. (fols. 217-223, 245, 268-270, 317, 333-340, 585-593).

After the said arrangements had been made, and on or about October 24, 1947, your petitioner applied to the Department of Welfare of the City of New York for the

release into his custody of his three younger children, Albert, George and Alice; and the said Department of Welfare agreed to release the said children into his custody, and directed the two respondent institutions to deliver the said children into his custody. But the said two institutions refused to deliver the said three children into the custody of your petitioner, for the alleged reason that in Soviet Armenia the said children would not receive the secular and religious education satisfactory to the said institutions, and particularly that they would not be brought up in the Roman Catholic religion (fols. 542-544, 595, 599, 1091).

Thereupon your petitioner sued out from the Supreme Court of the State of New York, the writs of habeas corpus which ultimately resulted in the decision of the Court of Appeals of the State of New York sought to be reviewed.

(c) The proceedings in the Courts of the State of New York.

The writs of habeas corpus were signed by a Justice of the Supreme Court of the State of New York on October 31, 1947, and directed the two respondent institutions, respectively, to produce the said children before the said Justice on November 1, 1947, at 8 A. M.,—the said SS. Rossia being scheduled to sail from the Port of New York in the forenoon of that day. On the morning of November 1, 1947, the respondent institutions appeared by attorneys and interposed identical returns (fols. 63-65, 89-91) which, after some formal denials, set up the following matter by way of defense:

> "That said infants and each of them is a natural born citizen of the United States of America having been born in the Borough of Manhattan, City, County and State of New York.
>
> That the petitioner, Hamportzoon Choolokian, the father of said infants, is, upon information and belief, unable to properly maintain, care for and educate said children or either of them and the mother of said infants is a person of unsound mind and unable to properly care for, maintain and educate said children or either of them.

That upon information and belief, the petitioner seeks to take said children and each of them into a foreign country presently operating under a system of law and education wholly different from the system of law and education in force in the United States of America and in the State of New York and under which said children were born and have so far been raised, educated and maintained.

That upon information and belief, the transfer of each of said children into such foreign land and under such conditions will be detrimental to the physical, mental, spiritual and educational welfare of said children, and each of them and neither of said children will receive appropriate care, maintenance and education or spiritual care in the said foreign land to which the petitioner proposes to take said children."

(Fols. 63-65, 89-91.)

The statement in the said returns as to the alleged inability of your petitioner properly to take care of and maintain his said minor children was contrary to the facts, as then known to the said answering institutions. Your petitioner is informed and verily believes that said statement was made not in good faith, but merely as a subterfuge to enable said institutions to detain said minors in their custody, so that they could rear them in the Roman Catholic religion, and otherwise in accordance with the ideas of said institutions as to the proper education that said children should receive, thereby also to prevent your petitioner from taking his children with him to Armenia and bringing them up in his own faith and in accordance with his own ideas as to their proper secular and religious education.

Thereafter, a hearing was had before the said Justice in the course of which it was conclusively established that arrangements had been made for the proper care and maintenance of the said minor children in Soviet Armenia during their minority, and for their education in the faith and in accordance with the ideas of your petitioner. Among other things it appeared at the said hearing that the Department of Welfare of the City of New York had investi-

gated the plans hereinbefore referred to under which your petitioner and the other Armenians were to be repatriated to Soviet Armenia; and that after such investigation the said Department, as hereinbefore stated, ordered the release of the said children into the custody of your petitioner as in the best interests of the said children. It appeared, among other things, that the said Department, before ordering the release of the said children, procured from the Consulate General of the U. S. S. R. in the City of New York a document reading as follows:

"CONSULATE GENERAL OF THE UNION OF
SOVIET SOCIALIST REPUBLICS
7 East 61st Street
New York 21, N. Y.

October 31, 1947

Commissioner of Welfare
of the City of New York
902 Broadway
New York 10, N. Y.

Dear Sir:

This is to inform you that Mr. Hamportzoon Choolakian has completed plans to take his three children, Albert, George and Alice, who are in your custody, to Soviet Armenia under plans which he has made with the Committee to Aid the Repatriation of Armenians and with the Consulate General of the Union of Soviet Socialist Republics.

This is to assure you that the transportation expenses of Mr. Choolakian and his family have already been provided by the Government of Soviet Armenia and that the Consulate General of the Union of Soviet Socialist Republics in New York guarantees that Mr. Choolakian's said children will not only be adequately transported to Soviet Armenia, but, in addition, that an adequate plan has been made for the care of these children in Soviet Armenia after their arrival there by their own parents or their relatives. We further guarantee that in the event that their parents or relatives will not be able to provide adequate care for these children, that the Soviet Armenian Government,

through the Ministry of Social Security and the Ministry of Education of Soviet Armenia, will provide such care as will best serve the interests of these children.

Very truly yours,

LEONID N. FEDOTOV,
Secretary

LF/al"

(Exh. 18, fols. 1138-1141).

The respondent-institutions were well aware of these facts at the time they made their said returns, and they were also aware of the fact, which was proved in the said proceedings, that your petitioner's wife, who had up to then been confined, because of her mental illness, at the Kings Park Hospital in the legal custody of the Commissioner of Mental Hygiene, had been ordered released by the said Commissioner, so that she might join your petitioner in returning to Soviet Armenia—*her situation, in so far as the State of New York was concerned, being no different from the situation of petitioner's three children involved in the said writs of habeas corpus.*

During the said proceedings your petitioner, through counsel who argued on his behalf and in support of his demand for the custody of his said children, submitted to and urged upon the said Justice that the remand of the said children to the custody of the institutions-respondent would be in violation of rights guaranteed to your petitioner by the Constitution of the United States, Section 800 of Title 8 of the U. S. C. A., the compact or agreement entered into by the Government of the United States with the Government of the U. S. S. R., and was contrary to the policy of the United States as established by its adhesion to the Declaration of Human Rights adopted by the United Nations. But notwithstanding the said proof and the said contentions, the said Justice dismissed the said writs and remanded the said children to the custody of the respondent-institutions, respectively, thereby depriving your petitioner of his said rights. Thereupon, your petitioner appealed

from the orders of the said Justice, dismissing the said writs, to the Appellate Division of the Supreme Court of the State of New York, which said Court affirmed the said decision. Thereupon your petitioner appealed from the last mentioned decision to the Court of Appeals of the State of New York, which said Court affirmed the decisions of the lower Courts. In the said Appellate Courts your petitioner again invoked the protection of the Constitution of the United States with respect to the rights guaranteed to him thereby, and also invoked the protection and claimed the rights accruing to him by the provisions of Section 800 of Title 8 of the U. S. C. A., and under the compact or agreement entered into between the Government of the United States and the Government of the U. S. S. R., and the policy of the Government of the United States hereinbefore mentioned and referred to (fols. 356, 604-606, 1118-1121, 1245-1271).

III. The importance of the matter to the Armenians resident in the United States, and to all persons interested in civil liberties and religious freedom.

Your petitioner respectfully submits that the matter involved in this petition is of the greatest importance not only to your petitioner, his children involved herein, and the rest of his family, but also to all Armenians resident in the United States, and to all persons in the United States interested in the preservation of civil liberties and religious freedom.

As already stated, your petitioner's decision to return with his family to Soviet Armenia was made as part of a general movement among Armenians resident in this country to return to Armenia. This movement among Armenians residing in this country was part of a movement among Armenians throughout the world to return to their ancient homeland, very much akin to the movement among Jews throughout the world to return to their

ancient homeland and establish the State of Israel. Because of centuries of subjugation by the Turkish Empire, Armenians have become dispersed throughout the world, much like the Jews; and many of them therefore desired to return to their ancient homeland and re-establish their ancient culture therein. And as in the case of the Jews, the Government of the United States manifested a great interest in the movement, and made it part of its public international policy to further the said movement. The Repatriation Plan hereinbefore referred to, and the compact or agreement between the Government of the United States and the Government of the U. S. S. R. evidenced by the exchange of notes set forth above, was the result of a desire by both the Government of the United States and the Government of the U. S. S. R. to further the said objective.

As this Court may take judicial notice of matters of public notoriety, your petitioner respectfully calls the attention of the Court to an item which appeared in the New York Times on November 2, 1947, the day after the SS. Rossia sailed from the Port of New York for Armenia, in which it is reported that a spokesman for the Committee to Aid the Repatriation of Armenians had stated that about 38,000 Armenians residing in this country had registered with that Committee, expressing their desire to return to Armenia; and also that among the Armenians departing for Soviet Armenia on the SS. Rossia there were about forty children. As it is a matter of public knowledge and of public record that no large influx of Armenians into the United States took place since the outbreak of World War II on September 1, 1939, it is obvious that most, if not all, of the children who sailed on the SS. Rossia must have been born in the United States. The question of what a State may do to prevent minor children of Armenian parentage born in the United States from going to Soviet Armenia is, therefore, a matter of the greatest importance to all those Armenians who may desire to return to their ancient homeland; and the question of whether a State

may prevent the minor children of such Armenians from going with their parents to Soviet Armenia, on political or religious grounds, is a matter of the greatest importance to all those who are interested in the preservation of civil liberties and religious freedom. The power asserted by the State of New York in the decision here sought to be reviewed, if it exists, may be exercised not only upon those minors who may through fortuitous circumstances be in the custody of its welfare agencies, but upon all minors who may be resident in that State. And if the State of New York possesses that power, all other States in the Union likewise possess that power.

That the matter is of the greatest public importance is shown by the fact that this case has received the widest publicity at the time of the sailing of the SS. Rossia, and has also received considerable publicity ever since, whenever the matter came up before the Courts of the State of New York. The said publicity was not confined to the metropolitan press of the City of New York, nor to the daily press alone. Shortly after the dismissal of the writs of habeas corpus by the Special Term of the Supreme Court of the State of New York, the matter was discussed in a long editorial in a well known national weekly; and nearly a year later, to wit, on September 29, 1948, the Christian Science Monitor carried a long article on the subject from its New York correspondent—occasioned by a statement issued by Bishop Charles K. Gilbert of the Protestant Episcopal Church, Bishop Tiran Nersoyan of the Armenian Apostolic Orthodox Church, and Dr. Robert W. Searle of the Protestant Council of the City of New York.

The great public interest in this case, both from the point of view of civil liberties and religious freedom, is also evidenced by the fact that the American Civil Liberties Union and two religious organizations, to wit: the Prelacy of the Armenian Church in North America, and the Protestant Council of the City of New York, appeared and

filed briefs as *amici curiae* in the proceedings before the Supreme Court of the State of New York, New York County, and also in the Appellate Courts of the State of New York, in support of your petitioner's efforts to obtain the custody of his said children.

B

THE QUESTIONS PRESENTED

The questions presented concern basic federal relations; fundamental rights guaranteed by the United States Constitution and the several amendments thereto; Acts of Congress confirming and defining those rights; rights claimed under a compact between the United States and a foreign government; and the public policy of the United States, to wit:

I. May a State, by legislation or through its executive or judicial departments, act in the domain of foreign relations, exclusively reserved by the Constitution of the United States to the Federal Government, so as to substantially affect the same?

II. May a State, by legislation or through its executive or judicial departments, assert its police power over unoffending persons leaving, or who desire to leave, its territory, in order to go to a foreign country?

III. May a State, by legislation or through its executive or judicial departments, prevent the departure from its territory of such persons, where their attempt to depart is in pursuance of a compact or agreement between the United States and a foreign government?

IV. May a State legislate, or otherwise act, with respect to the fundamental right of expatriation guaranteed by the United States Constitution and defined and covered by Congressional legislation?

V. More specifically, may a State, by legislation or through its executive or judicial departments, limit or abridge the fundamental right of expatriation guaranteed by the Constitution of the United States, and confirmed by Section 800 of Title 8 of the U. S. C. A., and more particularly defined by Section 807 of Title 8 of the U. S. C. A.?

VI. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the right of a father to determine temporarily and conditionally the nationality of his minor children granted to him by Section 807 of Title 8 of the U. S. C. A.?

VII. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father, guaranteed by the Constitution of the United States, to the custody, care and education of his minor children—except where, by reason of moral unfitness or mental incapacity of the father, it becomes the duty of the State to care for the children, while they remain residents thereof?

VIII. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father to the care and education of his minor children, guaranteed by the Constitution of the United States, for the specific reason that he intends to give them a secular or religious education not approved of by the State or its agencies?

IX. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father to the custody of his minor children, guaranteed by the Constitution of the United States, for the reason that the father desires to use such custody in order to take the children to a foreign country where they would be exposed to a system of secular and religious education not in conformity with "the American way of life"?

X. May a State, by legislation or through its executive or judicial departments, deprive, interfere with or abridge, the natural right of a father to the custody of his minor children, for the reason that the father desires to use such custody in order to take the children to a foreign country—in the face of the declared policy of the United States as embodied in its adhesion to the Declaration of Human Rights of the United Nations, and the specific compact or agreement between the Government of the United States and the Government of the U. S. S. R., whereby the United States agreed to the expatriation of Armenians resident in the United States, the renunciation of the citizenship of such of them as may be citizens of the United States, and assured the Government of the U. S. S. R. that the Armenians covered by the said compact or agreement would experience no difficulties if they should desire to emigrate to Soviet Armenia?

C

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is clear from the foregoing, that the instant case presents basic constitutional questions under the distribution of powers provided for by the United States Constitution, whereby the United States is constituted a sovereign nation—the only sovereign power under the Constitution with respect to foreign nations, to the exclusion of the individual States of the Union, and having sole jurisdiction in all matters affecting the foreign or international relations of the Nation, and particularly Article II, Section 2 thereof, which places the treaty-making power of the Nation in the Federal Government exclusively; under the First Article of Amendment to the Constitution of the United States which guarantees freedom of religion, freedom of conscience and of thought; under the Eighth Article of Amendment which prohibits cruel and unusual punishment; under

the Ninth Article of Amendment which protects the fundamental personal rights not specifically enumerated in the Constitution or other Articles of Amendment, including the natural right of a father to the custody and education of his children, and the right of expatriation; under the Fourteenth Article of Amendment which (1) makes citizenship in the United States primary and citizenship in a State derivative, dependent upon residence therein, and therefore inapplicable to persons seeking to depart therefrom, (2) prohibits the States from making any laws abridging the privileges or immunities of citizens of the United States, including the right of departing therefrom, (3) enjoins the States against depriving any person of life, liberty or property without due process of law, and (4) enjoins the States against depriving any person of the equal protection of the laws; under Section 800 of Title 8 of the U. S. C. A., which expressly confirms the fundamental right of expatriation, and Section 807 of the said Title which gives to citizens and residents of the United States the right to take their American born children to foreign parts, and protects the United States citizenship of such minor children; and under the Supremacy Clause of Article VI of the United States Constitution, which makes treaties, compacts and agreements, of the United States with foreign powers, and its declared policy in foreign relations, the supreme law of the land.

It is equally clear that the decision sought to be reviewed deprive your petitioner, his three children directly involved herein, and the rest of his family, of the constitutional, statutory, and other rights contended for by him, and that the matters involved herein are of great public importance, directly to a large section of the citizens and inhabitants of this country who may desire to emigrate to Soviet Armenia under the compact or agreement between the United States and the Government of the U. S. S. R. with respect to Armenians resident in the United States, and indirectly to all citizens and residents of the United States because of the questions of freedom of conscience, freedom

of thought and freedom of religion involved in the decision sought to be reviewed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings herein and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated: New York, January 10, 1950.

SAMUEL M. BLINKEN,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM 1949

No. .....

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

BRIEF IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI

The Justice of the Supreme Court of the State of New York before whom the proceedings on the writs of habeas corpus herein were had, wrote a long opinion clearly showing that the defenses alleged by the returns of the respondent-institutions raised matters of exclusively Fed-

eral cognizance, but he ignored this fact as well as the constitutional questions raised by counsel for petitioner and the counsel for the *amici curiae* who appeared in support of petitioner's demand for the custody of his children. This opinion is printed in the Record at pages 386-398 and is officially reported in 192 Misc. 454. The Appellate Division wrote no opinion. The Judges of the Court of Appeals wrote two opinions which appear at pages 436-437 of the Record and are officially reported in 300 N. Y. 43. These opinions make no reference to the constitutional questions involved. However, in an order made on December 29, 1949, the Court of Appeals, on petitioner's motion, amended the "Remittitur" by adding thereto the following:

> "This court has necessarily passed upon, and overruled, the contention of relator-appellant that the orders below had violated his absolute right to recover custody of his children in order to take them with him to Soviet Armenia; which right appellant had asserted as derived from the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, from Section 800, Title 8, United States Code, and from the exchange of notes between the United States Government and the Union of Soviet Socialist Republics, dated April Twenty-one and May Twenty-eight, 1947" (p. 444).

A

THE DECISION SOUGHT TO BE REVIEWED LIES IN A FIELD ENTIRELY BEYOND THE REACH OF STATE POWER

The writs of habeas corpus involved herein were obtained because the two institutions-respondent refused to release petitioner's children for the specific reason that he intended to take them to a foreign country—the avowed motive behind the refusal being that the particular country to which petitioner desired to take these children was objectionable to them on political and religious grounds. The

orders of the Supreme Court of the State of New York, affirmed by the decision of its Court of Appeals sought to be reviewed, remanded the children to the custody of the institutions-respondent for the same reason. In the course of the hearing in the Supreme Court the institutions-respondent put forward the additional ground for their refusal to release the children to their father that taking these children to a foreign country would endanger their American citizenship; and this contention, too, was sustained by the orders of the Supreme Court remanding the children to the custody of the institutions-respondent and by the decisions of the Court of Appeals sought to be reviewed.

We respectfully submit that the action of the institutions-respondent, claiming to derive their authority from the State of New York, and the decision of the New York courts sustaining the same, was in a field in which it is entirely beyond the competency of the State to act, through any of its agencies or departments, for the following reasons:

1. That the foreign relations of the United States are within the exclusive domain of the Federal government and therefore beyond the reach of State powers.

2. That, aside from the fact that the field of foreign relations is the exclusive domain of the Federal government, the States are incompetent to act in anything that lies beyond their territorial borders, such as the care, maintenance and education of minor children in a foreign land or another State.

3. That the protection of United States citizenship is a matter exclusively within the competence of the Federal government and no State has any right to act with respect thereto through any of its departments or agencies.

All of this irrespective of the motives which lay behind the action of the institutions-respondent and the New York courts in attempting to act in this field. As will be shown in another part of this brief, those motives run afoul of

constitutional guarantees and rights protected by acts of Congress and treaties of the United States Government. But at this place we desire to point out that the decision sought to be reviewed is "unconstitutional" in the general sense, quite irrespective of the specific constitutional objections discussed in later portions of this brief.

POINT I

The domain of foreign relations is exclusive in the United States by virtue of their existence as a sovereign nation, and is not dependent on any specific provision of the United States Constitution.

It is respectfully submitted that the regulation of admission of foreigners into the United States and departure of persons therefrom is part of the foreign relations of the United States. These regulations are therefore the exclusive domain of the Federal government and do not depend upon any specific provisions of the United States Constitution.

Chy Lung v. *Freeman,* 92 U. S. 550;
U. S. v. *Curtiss-Wright Export Corp.,* 299 U. S. 304;
U. S. v. *Belmont,* 301 U. S. 324;
Hines v. *Davidowitz,* 312 U. S. 52;
U. S. v. *Pink,* 315 U. S. 203.

The first case cited involved a statute of the State of California which sought to restrict the immigration into the State from foreign parts of "lewd or debauched women". In holding the statute unconstitutional, this Court said:

> "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States * * *; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the *National Government.* If it be otherwise, a

single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *

Chy Lung v. *Freeman,* 92 U. S. 550, 552.

It should be borne in mind that this was a case dealing with a person seeking *entry* into the State of California. The person sought to be excluded would, therefore, immediately upon such entry become a part of the population of the State, subject to its police power. Nevertheless this Court held that the *entry* of such persons cannot be regulated by the State since that is part of the foreign relations of the United States and is therefore within the exclusive domain of the Federal government. *A fortiori* does this exclusiveness of competency of the Federal government apply to a case of *departure* from the United States which removes the departing persons from the police power of the State.

The second case cited involved certain questions which will have to be considered in another connection in this brief as bearing upon the subject of the efficacy of the exchange of notes between the Government of the United States and the Government of the U. S. S. R. under which the petitioner sought to emigrate with his children to Soviet Armenia. At this point we desire only to quote that portion of the opinion of this Court which clearly marks out the subject of foreign relations as the exclusive domain of the Federal government irrespective of any specific provisions of our present Constitution. Said this Court:

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

"The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal government can exercise

* Emphasis supplied throughout unless otherwise stated.

no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U. S. 238, 294, 80 L. ed. 1160, 1180, 56 S. Ct. 855. That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United [not the several] Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'

"As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the Colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."

U. S. v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315-316.

* * * * * *

"The Union existed before the Constitution, which was ordained and established among other things to form 'a more perfect Union.' Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise."

U. S. v. *Curtiss-Wright,* supra, p. 317.

"It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to *maintain diplomatic relations with other sovereignties,* if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality."

U. S. v. *Curtiss-Wright,* supra, p. 318.

It is unnecessary at this point to discuss here or quote from the other cases cited above, particularly since they will have to be considered in further detail in connection with the question of the rights of the petitioner under the specific provisions of the United States Constitution being the subject of treaties within the exclusive domain of the United States. Suffice it to say here that they all emphasize the fact that no State may, under any pretext whatsoever, legislate or act in any manner *affecting the foreign relations of the United States and that the so-called police power of the States does not extend to that domain.*

POINT II

The police power of the State does not extend beyond its territorial boundaries.

We respectfully submit that quite aside from the fact that the decision sought to be reviewed is an attempt by the State of New York to act in the field of foreign relations which is the exclusive domain of the Federal government, the decision is "unconstitutional" in the broader sense in that it attempts to extend its power beyond its territorial jurisdiction. It is elementary that the power of a State does not extend beyond its boundaries and that its so-called police power is not different in this respect from any other of its powers. The reason is obvious: the so-called police

power is the result of its duty to protect the good order of the community and to provide for the safety, health, morals and welfare of its inhabitants. That this source of its power is also its limitation is settled by the decisions of this Court:

> "*It* (i.e. the Police Power) *springs from the obligation of the state to protect its citizens and provide for the safety and good order of society.* Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of *self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.*"
>
> *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613, 622.

Clearly, the State of New York would have neither obligations nor powers with respect to the Choolokian children after they should have been removed from its boundaries under the arrangement between the United States Government and the Government of the U. S. S. R. The detention of these children because of any alleged interest of the State of New York in their welfare while in Soviet Armenia is therefore clearly beyond the power of the State or any of its agencies or departments. Such "interest" can be no more—nor any more efficacious—than the abstract interest which the people of the State of New York may have generally in the condition of the people of Soviet Armenia or of any other foreign country—an "interest" which clearly does not give the State of New York any right, for that reason, to interfere with or regulate such conditions. As already pointed out, and as this Court has repeatedly stated, the concern of the people of New York in any such matters does not form a special interest which the State may protect, but merely an interest which the people of the State of New York have in common with the rest of the people of the United States, and can therefore be protected, if at all, only by the United States Government. The State

of New York would, therefore, have no power to prevent the departure of petitioner, and the taking with him of his children, even if such departure were not pursuant to an arrangement and compact made by the United States with the Government of the U. S. S. R. Certainly, it cannot do so in the present instance, when the attempt by petitioner to take his children with him to Armenia was in pursuance to a compact between the United States Government and the Government of the U. S. S. R., which the decision sought to be reviewed clearly contravenes and attempts to nullify.

POINT III

American citizenship is within the exclusive protection of the United States, and the several states can neither detract from nor add to that protection.

Since the United States is the only strictly sovereign power in this country, to the exclusion of the several States, it follows of necessity that the protection of American citizenship lies within the exclusive domain of the Federal government—that government being the only one capable and competent to act in our foreign relations, of which the protection of American citizenship outside the boundaries of the United States is of necessity a part. Clearly, if the State of New York attempted to "protect" the citizenship of the Choolokian children after they had left the United States such attempt would be a flagrant interference with the foreign relations of the United States. It is no less an interference with the foreign relations of the United States because the interference took the form of preventing their departure from the United States.

In this connection we must bear in mind that, strictly speaking, there is no such thing as State citizenship—notwithstanding the fact that we usually speak of our *dual* citizenship. While the Fourteenth Amendment speaks of our being citizens of the United States and of the States

wherein we reside, the State has no authority over our citizenship—*it can neither give it nor take it away.* That citizenship is given to us either by the Constitution of the United States—in the case of natural born citizens—or by laws of the United States made in pursuance to the United States Constitution. In so far as there is any State citizenship at all, it is derived from our national citizenship and is wholly subordinate to it. We can also shake it, without depriving ourselves of our United States citizenship, by removing permanently from the State of which we are citizens into another State, or into the District of Columbia, or a United States territory, or any one of the United States possessions.

That United States citizenship is primary and State citizenship is derivative has been definitely settled by the adoption of the Fourteenth Amendment.

> *Arver* v. *United States,* 245 U. S. 366;
> *Colgate* v. *Harvey,* 296 U. S. 404.

In the last case cited this Court said:

> "Thus the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And *while* the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship. 'In reviewing the subject', Chief Justice White said in the Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 377, 388, 389, 62 L. ed. 352, 353, 357, 358, 38 S. Ct. 159, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, 'we have hitherto considered it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that [the Fourteenth] Amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the Government under the Constitution by causing

citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest."

Colgate v. *Harvey,* 296 U. S. 427.

The State of New York, therefore, had no citizenship of its own to protect; and the United States citizenship of the Choolokian children was clearly within the exclusive protection of the United States. And as we shall see further below, the United States has specifically dealt with the subject and has given the Choolokian children all the protection of their American citizenship which Congress, in its wisdom, thought necessary. It should only be added that under well settled doctrine the States can neither detract from nor add to the "protection" of any subject, or matter, the regulation or protection of which is within the exclusive jurisdiction of the United States; nor detract from or add to such protection in a matter which might otherwise be within the legislative competency of a State but for the action of Congress in legislating upon the same. The first of these propositions is so self-evident that the subject has only seldom come before this Court in recent years. The second proposition is no less self-evident, and the large volume of litigation on the subject turned entirely on the question of whether or not Congress had actually intended to "occupy the field". Of the numerous cases on this branch of the law it is sufficient to cite the following:

Houston v. *Moore,* 5 Wheat. 1;
Hines v. *Davidowitz,* 312 U. S. 52;
Cloverleaf Butter Co. v. *Patterson,* 315 U. S. 148;
Northern Pacific Railway v. *Washington,* 222 U. S. 370.

The basic doctrine was well stated by Mr. Justice Washington in the earliest of these cases when he said in delivering the judgment of the Court:

> "In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other."
>
> *Houston* v. *Moore,* 5 Wheat. 1, 23.

It is clear that in a case where, under the Constitution, two wills are competent, it is the *superior* will that must prevail whenever the same has been expressed; and that where the subject is within the exclusive jurisdiction of one will, *only that will can be heard at all.* And it is equally clear that the present case belongs in the latter field.*

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* We have quoted in the petition the issue as tendered by the institutions-respondent in their returns, the essence of which is that the "petitioner seeks to take such children and each of them into a foreign country presently operating under a system of law and education wholly different from the system of law and education in force in the United States of America and in the State of New York". The opinion of the Supreme Court, at Special Term, commences with the following statement:

> "The relator * * * asserts his right to have these children returned to him for the purpose of taking them to Soviet Armenia" (fol. 1157).

It then states that:

> "The question presented is whether the Court can here make the determination that the interest of these children will be promoted by giving the father custody for the purpose of taking the children to Soviet Armenia, and that the father is fit, competent and able duly to maintain, support and educate the children in Soviet Armenia" (fol. 1161).

The Court then stated two reasons for its decision to remand the children to the institutions-respondent:

(1) That petitioner would be unable properly to take care of the children in Soviet Armenia; and

(2) That the American citizenship of the children would be jeopardized by their being taken to that country.

The substance of the first ground is contained in the following language of the Court:

"It does not appear what the father would do in Soviet Armenia to earn a living and what kind of a living it would be. * * * There is nothing in the Record to support the assertion in the letter of the Secretary of the Soviet Consulate that an adequate plan has been made for the care of the children in Armenia by their parents or their relatives. The statements in the letter of October 31 are therefore not supported by any facts or by the kind of knowledge or information to which this court can give any weight.

"Clearly this is not a sufficient showing to justify this court in finding as required by the Social Welfare Law that the father is 'fit, competent and able to duly maintain, support and educate' these three children in Soviet Armenia" (fols. 1186-1188).

It should be noted here that there was never any question raised as to the father's fitness which we take to refer to moral fitness; nor to his competence, which we take to refer to mental competence. Indeed, at least as far as the first question is concerned the Record affirmatively shows the father's moral fitness as well as his solicitude for the welfare of his children. In support of the other ground of the decision,—namely the danger of the children's American citizenship,—the Court sai

"If the father were permitted in this case to take these three infant children to Soviet Armenia, it seems clear under present conditions that their right to avail themselves of the privileges of their American citizenship might be forever lost. It is unthinkable that an American court could permit this father to place his infant children in such an irretrievable position. While he may make that choice for himself, it will certainly not promote the best interests of the children, as this court is required to find by Section 383 of the Social Welfare Law, to permit the father or anyone to dissipate beyond redemption these priceless rights of the children. The exercise of these rights should not be left to the remote chance that they might some day before their twenty-third birthday be able to escape from Armenia and return to the United States" (fol. 1170).

B

THE DECISION SOUGHT TO BE REVIEWED DEPRIVES PETITIONER OF THE RIGHT OF EXPATRIATION GUARANTEED TO HIM BY THE FUNDAMENTAL LAW AND ACTS OF CONGRESS; AND OF RIGHTS DERIVED FROM A TREATY OF THE UNITED STATES AND PROTECTED BY ITS PUBLIC POLICY

We respectfully submit that the decision sought to be reviewed deprives the petitioner of his natural and fundamental right of expatriation guaranteed by the Ninth Amendment to the United States Constitution; contravenes the specific provisions of Sections 800 and 807 of Title 8 of the U. S. C. A.; and denies to him rights guaranteed to him in a treaty of the United States and its declared public policy.

POINT IV

The right of expatriation is a fundamental right implicit in Article I, Section 8, Clause 4 of the United States Constitution and is guaranteed by the Ninth Amendment to the United States Constitution.

We respectfully submit that the right of expatriation is one of those natural and inalienable rights which is part of the fundamental law of the United States. It is implicitly recognized by the 4th Clause of Section 8 of Article I of the United States Constitution which gives to Congress the right to "establish an uniform rule of naturalization". The framers of our Constitution did not intend to arrogate to the Government of the United States a privilege which they did not believe was a natural right of all people. Such an arrogation of privileges was not the purpose of our Constitution; nor was it within its spirit. The framers,

recognizing the natural right of expatriation, merely intended that the regulation of admissions to American citizenship of expatriates from other lands should belong to the United States rather than the several States. The right of any citizen of the United States to leave any State and go elsewhere was recognized and considered as absolutely free, attaching to United States citizenship, and therefore beyond the regulative power of any of the States.

Slaughterhouse Cases, 16 Wall. 36;
Williams v. *Fears,* 179 U. S. 270.

This fundamental right is therefore one of the rights protected against denial or "disparagement" by the Ninth Amendment to the United States Constitution. That such is the case was recognized by this Court from the earliest days of its existence, although Congress had not acted upon it affirmatively until the year 1868. In the very early case of *Talbot* v. *Janson,* 3 Dall. 133, Mr. Justice Iredell, a member of the original Court appointed by President Washington, took occasion to affirm the doctrine, although the case before the Court did not call for it. In the course of his opinion in that case Mr. Justice Iredell said:

> "This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps it is not necessary it should be explicitly decided on this occasion; but I shall freely express my sentiments on the subject. That a man * * * should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, * * * are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize."

Talbot v. *Janson,* 3 Dall. 133, 161-162.

And whenever an occasion called for action by the executive department, that department acted in recognition

of that right. It is unnecessary to recite here the actions of the executive department prior to 1868, since in that year the right was recognized in an executive action participated in by the United States Senate—namely, the treaty with China of July 28, 1868. One of the articles of that Treaty read in part:

> "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance."

See:

Chae Chan Ping v. *U. S.*, 130 U. S. 581.

On the day preceding the date of this treaty—July 27, 1868—Congress confirmed this right, recognizing its fundamental character, by Joint Resolution which has since been embodied in the Nationality Code (U. S. C. A., Title 8, Sec. 800).

POINT V

The right of expatriation is recognized by the Nationality Code and is regulated by its provisions.

Section 800 of the Nationality Code (Title 8, U. S. C. A.) reads in part as follows:

> "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness, * * * Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, *is declared inconsistent with the fundamental principles of the Republic.*"

Section 807 of the Nationality Code reads in part as follows:

> "A person having American nationality, who is a minor and is residing in a foreign state with or under

> the legal custody of a parent who loses American nationality * * * shall at the same time lose his American nationality if such minor has or acquires the nationality of such foreign state: *Provided,* that, in such case, American nationality shall not be lost as the result of loss of American nationality by the parent unless and until the child attains the age of twenty-three years without having acquired permanent residence in the United States."

This Act of Congress, we respectfully submit, establishes four propositions:

First: That the right of expatriation is part of the fundamental law of the Republic of the United States, which no State can abridge, impede, or otherwise interfere with;

Second: That an American citizen who desires to expatriate has the right to take his minor children with him;

Third: That such minor children become divested of their American citizenship if they acquire the nationality of any foreign State;

Fourth: That such divestment of citizenship of the minors is conditioned not only upon their acquiring a foreign nationality, but also upon their failure to return to the United States, and acquiring a permanent residence therein, before they arrive at the age of twenty-three.

Thus the United States Nationality Code not only contains a guarantee of the right of expatriation to both adults and minors, but also, in the case of the latter, contains provisions which regulate the preservation of the same.

Again we respectfully call the attention of the Court to the fact that this subject is entirely beyond the regulatory sphere of the several States. They could not, therefore, pass any laws, or take any other action, with respect thereto, even if Congress had not specifically legislated on the subject. The right of expatriation and freedom of locomotion being part of the fundamental law of the Republic, the only government under our Constitution which could protect

American citizenship, if protection were required, is the Federal government; and no State could attempt to protect the same, either by way of preventing expatriation or otherwise, even if Congress had never acted upon the subject. But since Congress did act on the subject, it is clear that the several States have no right to act on the subject even if they could so act in the absence of congressional action. Congress having acted both with respect to the expatriation of minors and the protection of their citizenship, the States are utterly incompetent either to detract from or add to that protection.

The Congress of the United States has spoken and said that the provisions of Section 807 of the Nationality Code furnish the only protection required by American-born children of expatriating parents—that they may return to the United States and establish a permanent residence therein before they attain the age of twenty-three, by which action their American citizenship shall become unaffected by their previous expatriation. The only power within the Republic competent to speak in the premises having thus spoken, no State court or any other State agency may say that that protection is insufficient. Certainly, no State can, under the pretext of protecting the minors' American citizenship, deprive them of their fundamental right to become conditionally expatriated in accordance with the will of their parents.

But it is not only the right of the minor children that is here involved—the right of the parents not to have their expatriation impaired or interfered with by depriving them of the custody of the children is similarly involved. The Record in this case shows that petitioner was a loving parent and that he did not leave this country until it was stipulated in the Record that his leaving this country would not in any way affect his right to the custody of his children (fols. 1178, 1181). He had a right to leave this country in the expectation that the right guaranteed by the Constitution and the laws of the United States to him and his children would not be denied. He still expects that right to be granted him by this Court.

POINT VI

The right guaranteed to petitioner and his children by the Constitution and laws of the United States, was also guaranteed by a treaty of the United States, and by its declared public policy.

In view of the specific provisions of the governing statute of the United States, it would seem unnecessary to appeal to any other protection of petitioner's rights and the rights of his children in the premises. However, in view of the action of the highest court of the State of New York, we would consider ourselves remiss in our duty if we did not discuss the other aspects of the case, including the declared policy of the United States and the treaty or compact entered into between it and the Government of the U. S. S. R.—particularly since this case arose as the direct result of that compact.

The public policy of the United States in this respect was officially declared, as already stated, in 1868, both in the act which was embodied in the Nationality Code and in one of the articles of a formal treaty with a foreign power. It has since been reaffirmed by the adhesion of the United States to the Declaration of Human Rights adopted by the United Nations. That declaration reads in part as follows:

"Article 14(2)

Everyone has the right to leave any country, including his own * * *"

"Article 17(3)

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

These two declarations, taken together, make it clear that the right of expatriation of necessity includes the right of expatriating parents to take their children along with them.

Indeed, without such right, the right of expatriation, a right which the Nationality Code declares not only to be "natural and inherent" but also "indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness", would be but an empty right, if not an actual mockery.

This policy of the United States, which was recognized as part of its fundamental law throughout our existence as a nation, now made part of the Declaration of Human Rights by the world organization which this government was largely instrumental in creating, was embodied in a specific compact which, we respectfully submit, has the force of a treaty, between the Government of the United States and the Government of the U. S. S. R. As already stated, this case arose directly as a result of the compact between the two governments embodied in the exchange of notes set forth in the petition. Indeed, the ship upon which petitioner and part of his family left the United States and on which the children involved in this litigation were to sail with him, was provided by the other contracting party to this compact in reliance upon this government complying with its part of the compact, which, among other things, assured the Embassy of the U. S. S. R. "that no difficulties will be experienced by persons of Armenian origin in the United States who desire to emigrate to the Soviet Union".

Needless to say, the deprivation of the right to take one's children along with him while expatriating to another country is one of the greatest *"difficulties"* which could possibly be "experienced".

We respectfully submit that the United States Government having pledged its word that no difficulties would be experienced by the Armenians desiring to take advantage of the compact between our Government and the Government of the U. S. S. R., no State may erect such difficulties, irrespective of the motives which actuated the same or the reasons therefor.

We have already pointed out that one of the reasons assigned by the New York Supreme Court, namely, that petitioner's taking his children with him to Soviet Armenia would endanger their American citizenship, is utterly untenable in view of the Act of Congress governing the subject. It is equally clear that the other ground assigned by that Court, namely, that the compact between our Government and the Government of the U. S. S. R. did not make sufficient provision for the care, maintenance and education of the minors involved herein, is equally untenable, if not more so. As pointed out in an earlier portion of this brief, it is not the duty of any State to provide for the care, maintenance and education of any children born within its jurisdiction after they have left that jurisdiction, nor is it within its competency to require any protection for such care, maintenance or education after such children have gone beyond its boundaries. This is particularly the case where their departure is for a foreign country and the protection of their rights, if such be needed, becomes the exclusive concern of the United States Government.

It so happens that in this case, as the Record shows, there actually was provision made for the care and maintenance of the children involved here, along with the many other adults and children who sailed on the SS. Rossia on November 1, 1947, or who would sail thereafter under the terms of the compact. It also so happens that in addition to the provisions made in the general plan referred to in the Record, the foreign power involved, the Government of the U. S. S. R., has executed a special guarantee for the proper care, maintenance and education of petitioner's children. We respectfully submit that the rights of the petitioner and his children did not depend on the sufficiency of that guarantee, for the State of New York had no right to exact such guarantee from the Government of the U. S. S. R. But there it was, a fact showing the great interest taken by the Government of the U. S. S. R. in the matter, which was equalled by the interest of the United States as shown by the fact that it has waived all passport requirements

for those sailing on the SS. Rossia in pursuance to the compact embodied in the exchange of notes. The State of New York clearly had no right or power to pass upon the sufficiency of the guarantee. And it is additional proof of the danger of permitting State interference in such delicate matters of diplomacy and foreign relations as are here involved that the Justice of the New York Supreme Court in passing on this question—as also when he passed on the question of the alleged danger to the American citizenship of the children involved in this case—used intemperate language, language clearly calculated to exacerbate the relations between the Government of the United States and the Government of the U. S. S. R. which the exchange of notes sought to improve.

That a compact or agreement between our Government and a foreign power, such as is involved in this case, is a treaty within the meaning of Article VI of the Constitution making treaties of the United States the supreme law of the land, is settled by the decisions of this Court:

U. S. v. *Curtiss-Wright Export Co.*, 299 U. S. 304;
U. S. v. *Belmont*, 301 U. S. 324;
U. S. v. *Pink*, 315 U. S. 203.

The first case cited involved the validity of an indictment for an alleged violation of the terms of a proclamation issued by the President of the United States in pursuance to a Joint Resolution of Congress prohibiting the sale of arms or munitions to the belligerents of the so-called Chaco War. The indictment was dismissed by the District Court on the ground that neither the Joint Resolution nor the proclamation, nor the two together, constituted a law of the United States, since they constituted neither a statute nor a treaty. This Court reversed the judgment of the Court below, holding that the proclamation in question was a law of the United States, having the force of a treaty even though not a formal treaty concluded in accordance with the provisions of the treaty-making power of the

United States. In the course of its opinion in that case this Court said:

> "The power to make such international agreements as do not constitute treaties in the constitutional sense * * * exist as inherently inseparable from the conception of nationality."
>
> *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318.

The second case cited involved an exchange of notes such as is involved in this case between the same two powers herein, commonly referred to as the Litvinoff Agreement. The United States brought suit in the U. S. District Court for the Southern District of New York to recover a fund deposited with a private banker, a citizen of the State of New York, claimed to have been assigned to it by the informal note executed by the representative of the U. S. S. R. The District Court dismissed the complaint on the ground that the exchange of notes did not constitute a treaty and that the fund claimed to be assigned by the Government of the U. S. S. R. to the United States had been illegally confiscated by the first named government and it was therefore contrary to the policy of the State of New York to make any judgment which would give efficacy to such confiscation. This Court reversed, holding that the exchange of notes constituted a compact between the United States and the Government of the U. S. S. R. having the force of a treaty which could not be thwarted by the policy of the State of New York. In the course of its opinion in that case this Court said:

> "We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved."

And in speaking of compacts as distinguished from formal treaties, but nevertheless constituting the supreme law of the land, this Court said:

> "There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations."
>
> *U. S.* v. *Belmont,* 301 U. S. 324, 327, 330.

The third case cited was also an action by the United States to recover a fund based on the so-called Litvinoff Agreement. This fund was in the hands of the Superintendent of Insurance of the State of New York and the action was brought in the Supreme Court of that State. The Supreme Court of the State of New York gave judgment in favor of the defendant and the judgment was affirmed by the Appellate Division and the Court of Appeals. The reasons assigned by the courts of the State of New York for their decisions were the same as those of the United States District Court in the *Belmont* case, except that the New York courts added that to give effect to the confiscatory decree of the Russian Government would be contrary not only to the policy of the State of New York but also to the policy of the United States. This Court reversed the judgments of the New York State courts for the same reasons that led to the reversal of the decision of the District Court in the *Belmont* case. In its opinion in the later case this Court quoted from the *Belmont* case the passages quoted by us above and then added:

> "A treaty is a 'Law of the Land' under the supremacy clause (Art. 6, Cl. 2) of the Constitution. *Such international compacts and agreements as the Litvinof Assignment have a similar dignity.*"
>
> *U. S.* v. *Pink,* 315 U. S. 203, 230.

C

THE DECISION SOUGHT TO BE REVIEWED VIOLATES PETITIONER'S NATURAL AND CONSTITUTIONAL RIGHTS TO THE CUSTODY, CARE AND EDUCATION OF HIS CHILDREN; AND OFFENDS THE PROVISIONS OF THE FIRST, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The foregoing discussion proceeded from the nature of the distribution of powers under our Constitution between the Federal and State governments,—the argument being that the State of New York was incompetent to act in the premises in any manner whatsoever. The reasons or motives which actuated the State functionaries, and the *manner* in which they acted, was therefore immaterial to the argument. We now turn to another aspect of the case,—an aspect in which the *manner* in which the State of New York acted, and the reasons and motives from which it acted, become material. The argument in this portion of the brief will assume that the State was competent to act under its police power; and the argument will proceed not from the distribution of powers between the Federal and State governments, but from the limitations placed upon governmental action, Federal and State alike, by the provisions of the United States Constitution, express or implied.

A reading of the Record herein will demonstrate beyond peradventure of a doubt that the action of the institutions-respondent, in refusing to release petitioner's minor children, sanctioned by the New York courts in dismissing the writs of habeas corpus and remanding the children to the custody of the institutions-respondent, was the result of a desire to impose upon petitioner and his children certain political tenets and a particular form of religion. In order not to extend this brief unduly, we shall point here only to some of the significant facts in the Record.

In the first place, we again call the attention of this Court to the issue as joined by the returns to the writs of habeas corpus. The salient point of these returns is contained in the statement that a release of the children to their father would result in their being brought up "under a system of law and education wholly different from the system of law and education in force in the United States of America."

We next come to the hearing upon the issue thus joined, only to find that the refusal to release the children to their natural and constitutional guardian, was based not only on a desire to rear them in accordance with certain political tenets, but also to impose upon them a religious education,—nay, a particular religious faith. This religious *motif* appears throughout the cross-examination by counsel for the institutions-respondent of the witnesses produced by petitioner, as well as in the testimony adduced on behalf of the institutions-respondent themselves. It is sufficient to point here to the close questioning of petitioner's witnesses by counsel for the institutions-respondent as to whether any religious education had been provided for these children in Soviet Armenia, and what kind of a religious education they would receive there,—including the question as to whether or not there was a Roman Catholic Church in the city to which the children were being taken (fols. 238, 243, 294-296, 297, 301, 373-376, 602-622, 630, 632, 702-709, 723-736, 915). This was followed by evidence introduced by the institutions-respondent of the fact that the children had been baptized in the Roman Catholic Church (fols. 803, 870). Counsel for the petitioner rightfully objected to this whole line of testimony on the ground that the same was irrelevant to the issues of the case, but was overruled by the Court,—the Court thus holding in effect that the fact that the children had been baptized in a certain religious faith, and that their release to the father would result in their being brought up in a different religious faith, was the concern of the State of New York.

And the whole matter was clinched by counsel for the institutions-respondent in a motion to dismiss the writs, at the close of the hearing, on the ground that—

> "• • • *it appears affirmatively that the last religion officially designated by the father of the children for them to the Department of Public Welfare of the City of New York, was the Roman Catholic religion, and that there is no evidence that any facilities for the practice of said religion will be available to the said children in Soviet Armenia*" (fol. 1091).

Thus the Record clearly demonstrates that the real motive behind the decision sought to be reviewed, if not its avowed reason, is the fact that a release of the children to the custody of their father would result in their being brought up in accordance with political tenets and religious beliefs disapproved of by the institutions-respondent generally, and by the State of New York in this case.

POINT VII

The decision sought to be reviewed is violative of the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

Before proceeding to discuss the larger aspects of religious freedom and personal liberty involved in the decision sought to be reviewed, we desire to call attention to a subsidiary question, which does not loom large in this case because of the much larger issues presented by it, but which serves to point up those issues.

The Court will recall that petitioner voluntarily placed his children in the custody of the Department of Welfare of the City of New York because his wife had become mentally ill and had been committed to a State institution for the mentally ill. The Court will also recall that petitioner's wife had been released by the New York

State institution for the mentally ill on November 1, 1947, so that she could accompany her husband to Soviet Armenia, although she had not yet been cured of her ailment. We now desire to call the attention of the Court to the fact that, under the laws of the State of New York, the provisions for the release of the mentally ill are substantially the same as those for the release of minor children who are in the legal custody of State institutions. The statute invoked by the New York courts for their decision to remand the petitioner's children to the custody of the institutions-respondent, provides that the releasing authority must be satisfied that the

> "interest of said child will be promoted thereby and that such parent is fit, competent and duly able to maintain, support and educate such child."
>
> (Social Welfare Law, Sec. 383.)

The law governing the release of mentally ill patients from a State institution provides that the releasing authority must be satisfied,

> "by sufficient proof that friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge."
>
> (Mental Hygiene Law, Sec. 87.)

Before petitioner's wife could be released from the Kings Park Hospital, it was therefore incumbent upon the Commissioner of Mental Hygiene to determine that provision had been made for the proper care and maintenance of petitioner's wife. Petitioner clearly was in no better position to take care of his mentally ill wife than he was of his minor children. And yet the decision of the State of New York was different in the case of the wife than that of the children. There could be only one explanation for the different treatment given by the State of New York to petitioner's wife on the one hand and to his children on the other,—namely, that no question of

political or religious education was involved in the case of the wife but was involved in the case of the children. This, we respectfully submit, offends against the equal protection of the laws of the Fourteenth Amendment. And, in any event, it points to the real motive behind the decision sought to be reviewed.

POINT VIII

The right of parents to control the secular and religious education of their children is a fundamental right guaranteed by the Constitution of the United States.

We respectfully submit that the decision sought to be reviewed invades petitioner's fundamental right to control the secular and religious education of his three children involved in this litigation, which right is guaranteed to him by the Constitution of the United States.

As already stated, in this part of the brief we treat the problem as if it did not involve the foreign relations of the United States, or the right of expatriation under the statutes of the United States, and that the State would therefore have some rights with respect to the education of petitioner's children under its general police power. The argument here is that the police power of the State with respect to the education of children is limited within narrow confines by the United States Constitution and the several amendments thereto. One of the limitations upon the power of the State in this regard is that it may not interfere with the fundamental right of parents to the control of the secular and religious education of their children.

Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters of Holy Names*, 268 U. S. 510.

In the second case cited, this Court said with respect to the general right of parents to control the education of their children:

> "The child is not the mere creature of the state; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*"

And referring to the doctrine laid down in the earlier case with respect to the limitation placed by the Constitution upon the power of the State in this field, this Court said:

> "Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 37 L. ed. 1042, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."
>
> *Pierce* v. *Society of Sisters of Holy Names,* 268 U. S. 510, 534, 535.

POINT IX

The First and Fourteenth Amendments prohibit a State from using its police power so as to interfere with the fundamental right of parents to control the secular and religious education of their children by imposing its own standards.

It is settled by the decisions of this Court that the secular and religious freedoms guaranteed by the First Amendment, now made operative against the States through the Fourteenth Amendment, forbid a state to interfere with the right of parents to control the secular and religious education of their children by providing its own standards in that respect. In the *Pierce* case, this Court

said, in a passage immediately following the passage last quoted:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

And in *Meyer* v. *Nebraska* this Court said:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (Citing cases.) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."
>
> *Meyer* v. *Nebraska,* 262 U. S. 390, 399.

And in recent decisions this Court has emphasized the fact that a State may do nothing which even remotely interferes with the absolute right of a parent to control the secular and religious education of his children.

> *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624;
>
> *McCollum* v. *Board of Education,* 333 U. S. 203.

It is unnecessary here to rehearse the facts in these cases or to quote from the opinions rendered therein. We merely desire to point here to the fact that in both of these cases

the right of the parent to control the secular or religious education of the children is taken for granted. Both of these cases involved children of public school age who were merely following the directions of their parents, and it was the parents that invoked the constitutional protection of their ideas which they desired to implant into their children,—in the first case involving sectarian religious scruples, and in the second case objection to any kind of religious instruction to the child because of the parents' non-belief.

POINT X

The decision sought to be reviewed imposes upon petitioner and his children cruel and unusual punishment contrary to the provisions of the Eighth Amendment to the United States Constitution.

It need hardly be argued that the right of a parent to the custody of his children, and the right of children to parental care, are fundamental rights protected by the United States Constitution. A parent may not therefore be deprived of the custody of his children, nor children deprived of parental care, except in pursuance to an overriding *public purpose.*

That the desire of a State to impose upon children a particular mode of political thought, or to rear them in accordance with its views on religion, is not such a public purpose under our Constitution is self-evident. The decision sought to be reviewed is therefore not only violative of the specific provisions of the First and Fourteenth Amendments, and of basic rights protected against disparagement by the Ninth Amendment, but also of the provisions contained in the Eighth Amendment against cruel and unusual punishment.

> "But can persons expelled be subjected to 'cruel and unsual punishment' in the process of expulsion, as would be the case if children born in this country

were separated from them on their departure because citizens of the United States?"

U. S. v. *Wong Kim Ark,* 169 U. S. 649, 729.

It is true that the provision against cruel and unusual punishment is contained in that amendment in a context indicating that the primary purpose was to prevent cruel and unusual punishment in criminal cases. But, clearly, what cannot be done as punishment in a criminal case cannot be done to persons guilty of no offense whatever. And the language just quoted clearly shows that the prohibition is a general one. Furthermore, this Court has repeatedly held that constitutional prohibitions couched in language which traditionally has reference only to criminal cases, have wider import in our Constitution. Such, for instance, are the prohibitions against bills of attainder and *ex post facto* laws. Both of these terms have traditionally been applied only to criminal cases. Nevertheless, this Court has repeatedly held that they apply whenever injury is inflicted, even though that is done by civil process instead of criminal prosecution.

Ex parte Garland, 4 Wall. 333;
Pierce v. *Corskadon,* 16 Wall. 234;
U. S. v. *Lovett,* 328 U. S. 303.

CONCLUSION

We respectfully submit that three things are clear from the foregoing:

1. That by the decision sought to be reviewed the State of New York intruded into a Federal domain from which the several States are completely excluded.

2. That the decision sought to be reviewed is an exercise of power by the State of New York violative of the provisions of the United States Constitution and the several articles of amendment thereto.

3. That the subject matter involved is of the greatest public importance, affecting as it does directly the civil and religious liberties of a large section of our population, and indirectly those of every citizen and inhabitant of this country.

This is therefore a case eminently proper for review by this Court. The writ of *certiorari* prayed for should accordingly be granted by this Court so that a full argument of the important constitutional questions raised may be had, and judgment directed by this Court in accordance with its interpretation of the constitutional rights involved.

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Respectfully submitted,

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